

REMARKS

Claims 1-114 are pending, with claims 8-9, 17-19, 38-81, 89-90, 97-98, 101, 106, 108-112, and 114 being withdrawn without prejudice in view of the Species Election Requirement mailed August 25, 2006, to which this paper is responsive. No claims are amended. **Applicants herewith elect, with traverse, Species 4, namely the species of a diaphragm-based reservoir identified by Examiner in relation to Figs. 7-8, and submit that at least claims 1-7, 10-16, 20-37, 82-88, 91-96, 99-100, 102-105, 107 and 113 are readable thereon, with at least claims 1, 4, 11, 13, 35 and 113 being generic.**¹

Examiner has interposed a species election requirement identifying eight alleged species, with Species 1-7 relating to allegedly different species of a diaphragm-based reservoir ("Reservoir Species"), and Species 8 relating to a system that includes a diaphragm-based reservoir ("System Species").² Applicants submit that there are a number of features that overlap between the Reservoir Species (Species 1-7), and that the

¹ Applicants initially submitted a Response to the Species Election on September 1, 2006, based upon the originally filed claims, not on the claims as amended (many of the independent claims) or newly presented (claims 113 and 114) in a Preliminary Amendment. That error, for which Applicants apologize, is the basis for the Non-Compliant Amendment Notice and necessitated this resubmission. This resubmission presents the correctly amended claims as well as claims 113 and 114 in the Listing of Claims, and with claim 113 added to the claims which are asserted to read on the elected species, and claim 114 withdrawn without prejudice.

² Examiner has set out the Species as: Species 1 drawn to a diaphragm-based reservoir identified in relation to Figs. 1-2; Species 2 drawn to a diaphragm-based reservoir identified in relation to Figs. 3-5; Species 3 drawn to a diaphragm-based reservoir identified in relation to Fig. 6; Species 4 drawn to a diaphragm-based reservoir identified in relation to Figs. 7-8; Species 5 drawn to a diaphragm-based reservoir identified in relation to Figs. 9-10; Species 6 drawn to a diaphragm-based reservoir identified in relation to Fig. 11; Species 7 drawn to a diaphragm-based reservoir identified in relation to Fig. 12; and Species 8 drawn to a diaphragm-based reservoir system identified in relation to Fig. 13.

System Species applies to any and all of the Reservoir Species. Applicants are electing, with traverse, the species identified by Examiner as Species 4. Applicants have identified the claims which correspond to the reservoir of the elected species per se, and have marked as withdrawn both those claims directed to the non-elected Reservoir Species, and all of the claims directed to the System Species. Applicants note, however, that many of the withdrawn claims directed to the Reservoir Species are dependent claims, which should be restored upon allowability of a claim from which any such claim depends (notably claims 8, 9, 17-19, 89, 90, 97, 98, 101, and 106). The other Reservoir Species claims (notably claims 67-81 and 108-112) may be entitled to be restored upon allowance of a generic claim, because they would otherwise be within the scope thereof and/or for other reasons depending upon which claims are ultimately allowed in this case. Finally, any System Species claims (which are apparatus claims 38-57 and method claims 58-66, and 114) that include as part thereof any reservoir that is otherwise the subject of an allowed claim should also be restored. Indeed, Applicants do not agree that the System Species should have been required to be elected separately, given that it is the reservoir aspect(s) thereof which are the primary focus. Hence, if a Reservoir Species claim is allowed, and a System Species claim includes as an element thereof the same claimed reservoir, the System Species claim should be restored and allowed. Hence, claims are marked as withdrawn without prejudice both to later seeking restoration of any of same in this application and/or seeking claims directed thereto in a subsequent filing.

Examiner did not identify the various alleged differences between the species. Applicants note that the specification explains that there is substantial overlap in certain aspects thereof. For example, all of the Species include a rigid wall, a diaphragm

(flexible membrane) affixed thereto and defining a variable volume chamber therebetween, inlet and outlet ports, and a drive surface to engage against the membrane to hold the membrane in a minimum volume position. Most all of the Species further expressly include a stem for a mounting bracket, the membrane matching the shape of the rigid wall, a drive rod, a housing, and structure to hold the drive rod relative to the housing to position the membrane. Thus, it is not seen that the extreme range of Species as identified by Examiner makes sense, especially when (leaving the System Species aside, most of which it is asserted should be retained in view of the recitation of the same reservoir features as recited in the non-withdrawn claims), the net result is to withdraw only a small number of the Reservoir Species claims, namely, those that are directed to (a) the membrane and drive surface being coupled (Species 3) or (b) the generally enclosed flow path (Species 7).

In any event, many of the Reservoir Species claims remain, and Examiner is respectfully requested to restore at least those System Species claims which have as an express element thereof, the reservoir of claims that have not been withdrawn.³

Moreover, it is respectfully submitted that the species election requirement is inappropriate altogether, given the substantial overlap of the various features thereof. Thus, Examiner will necessarily have to undertake a search that covers, in effect, all of the Species. As the search effort would thus be the same, the Office resources would be sufficient to address all issues in one case, rather than place Applicants (and their

³ The System Species claims which Applicants thus submit should be immediately restored, and the species election requirement withdrawn thereon, are at least claims 38-43, 46-50, 52-59, 62-66, and 114.

Assignee) at risk of having to endure the costs of multiple filings and, if successful, multiple patents.

The species election requirement is thus traversed for at least the above-stated reasons. Applicants expressly make no admission, however, that art teaching one Species would render obvious claims to any other species. Thus, Applicants do not here take a position, or make any concession, as to whether or not the Species are patentably distinct, nor is it seen necessary to take any such position or make any such concession. Applicants also have not, at this time, addressed the inventive entity pending final determination of allowable claims.

Nonetheless, to be responsive and to move prosecution forward, Applicant has elected what Examiner has identified as Species 4, without waiver of the right to seek restoration of claims currently marked as withdrawn and/or or to seek claims directed to what Examiner has identified as any other Species in a subsequent or further filing.

CONCLUSION

In view of the foregoing, Applicants request withdrawal of the species election requirement either in total, or at least as to the system aspects of Species 8 that overlap with the reservoir species, particularly as elected. In any event, Applicants elect, with traverse, Species 4, namely the species of a diaphragm-based reservoir identified by Examiner in relation to Figs. 7-8, and submit that at least claims 1-7, 10-16, 20-37, 82-88, 91-96, 99-100, 102-105, 107, and 113 are readable thereon, with at least claims 1, 4, 11, 13, 35, and 113 being generic.

Applicants respectfully solicit examination on the merits and a formal Notice of Allowance at the earliest opportunity. Applicants note that this Application is

two and a half years old, and has yet to have the benefit of an examination on the patentable merits of any claim. If any issues remain, Examiner is thus respectfully asked to telephone undersigned attorney in an effort to promptly resolve same.

No fee is believed due for this paper. If any fee is due, please take this as authorization to charge same to our Deposit Account 23-3000.

Respectfully submitted,

WOOD, HERRON & EVANS, L.L.P.

By: /kurt l grossman/
Kurt L. Grossman
Reg. No. 29,799

411 Vine Street
2700 Carew Tower
Cincinnati, OH 45202
(513) 241-2324
(513) 241-6234 (fax)